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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 701 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 701

LA CROSSE TELEPHONE CORPORATION,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE, AND J. E. FITZGIBBON,
Appellee

I

STATEMENT AS TO JURISDICTION

The Appellant, La Crosse Telephone Corporation, concurrently with the presentation of its petition for the allowance of an appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States, presents herewith this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to reverse the order and decree from which said appeal is taken.

II

Statutes Sustaining Jurisdiction

The statutory provision believed to sustain jurisdiction, in Title 28, Section 344A of the United States Code, Section

237A of the United States Judicial Code as amended by the Act of January 31, 1928, and particularly the following provisions thereof:

> "A final judgment or decree in any suit in the highest court of this State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."
>
> Section 237 Judicial Code, Title 28, Federal Code Annotated, Par. 344 (a).

III

The Statute of the State of Wisconsin, the Validity of Which Is Involved

The statute of the State of Wisconsin, the validity of which is involved is entitled the "Wisconsin Employment Relations Act," also denominated the "Employment Peace Act", Wisconsin Statutes of 1945, Chapter 111; Sections 111.01 to 111.19 inclusive. The pertinent provisions of said statutes are as follows:

> Section 111.02 (2) defines employer as "a person who engages the services of an employee."
>
> Section 111.02 (4) defines representatives as any person chosen by an employee to represent him.
>
> Section 111.02 (6) defines the term "collective bargaining unit" as all of the employes of one employer (employed within the State), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05 (2) to constitute such group a separate bargaining unit they shall

be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the board may find, where agreeable to all parties affected in any way thereby, an industry, trade, or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the board shall be subject to all rights by termination or modification given by this subchapter I of Chapter 111 in reference to collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in Section 111.05 (2) so to do.

Section 111.03 provides for the creation of a board of three members and its organization.

Section 111.05 (1) provides for choosing of representatives for the purpose of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining.

Section 111.05 (2) provides that an election shall be determined by secret ballot and that the board shall upon request cause the ballot to be taken in a manner to show the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

Section 111.05 (3) provides for certifying in writing the results of an election to the interested parties, the names of all persons submitted by an employee, or a group of employees participating in the election, excepting that the board may in its discretion exclude from the ballot one who at the time of the election stands deprived of his rights by reason of a prior adjudication of his having engaged in an unfair labor practice and also shall be prepared so as to permit of a vote against representation by anyone named on the ballot.

IV

The Date of Judgment and Application for Appeal

The final judgment of the Supreme Court of Wisconsin which is sought to be reversed was entered and made of record on December 23, 1947. Petition for appeal was presented and filed on the 25th day of February, 1948.

V

Nature of the Case and Rulings of the Court

This case presents the question of jurisdiction of the Wisconsin Employment Relations Board over two issues between the La Crosse Telephone Corporation and its employees: (1) The selection of bargaining representatives for labor; and (2) the determining of contract rights.

On September 20, 1946, the Telephone Guild, affiliated with the National Federation of Telephone Workers (hereinafter referred to as the "Guild"), filed a petition with the National Labor Relations Board at Minneapolis, Minnesota, alleging that a question of representation affecting commerce had arisen. On September 24, 1946, notice of such petition was mailed to the La Crosse Telephone Corporation. On October 8, 1946, the Guild filed a petition with the Wisconsin Employment Relations Board requesting an election among the employees of the La Crosse Telephone Corporation for the purpose of determining what, if any, representation such employees desired for the purpose of collective bargaining. On October 18, 1946, the Wisconsin Employment Relations Board took jurisdiction and conducted a hearing at La Crosse, Wisconsin, pursuant to the petition of the Guild.

On November 27, 1946, the Wisconsin Employment Relations Board directed that an election be held within 30

days and filed a memorandum decision in which it found that at the time the petition was filed with the National Labor Relations Board that a collective bargaining agreement which the La Crosse Telephone Corporation had with the International Brotherhood of Electrical Workers was by its terms to expire on December 1, 1946, since amendments thereto which had previously been petitioned for had not been approved by the IBEW and the company had not received notice of such approval prior to the notification by the National Labor Relations Board of the fact that the Guild had filed a petition alleging that a question of representation affecting commerce had arisen. On February 7, 1947, the La Crosse Telephone Corporation petitioned the Circuit Court for La Crosse County, Wisconsin for a review of the decision of the Wisconsin Employment Relations Board pursuant to the provisions of Section 111.07 (8) of the Wisconsin statutes. This petition contended that the decisions, orders and certifications, of the Wisconsin Employment Relations Board were without its jurisdiction, in excess of its statutory authority, erroneous as a matter of law, and contrary to the constitutional rights and privileges of the La Crosse Telephone Corporation (R. 102-107).

Petition for review was brought on for hearing before the Honorable R. S. Cowie, Circuit Judge of the Circuit Court of La Crosse County, Wisconsin. After hearing oral arguments and considering briefs which were filed the trial judge took the matter under advisement. While considering the issues raised by the petitioner, the decision of United States Supreme Court in the case of *Bethlehem Steel Company et al.* v. *New York State Labor Relations Board* and *Allegheny-Ludlum Steel Corporation* v. *William J. Kelly et al.*, was filed, and immediately counsel for petitioner brought such decision to the attention of Judge Cowie. On April 28, 1947, the court filed a memorandum written

decision in which the court concluded that the action taken by the Wisconsin Employment Relations Board was without jurisdiction and void. In this decision the trial judge stated:

> "It is my opinion that this decision of the United States Supreme Court leaves no constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to collective bargaining elections among employes or employers engaged in interstate commerce, and of course it is admitted that the La Crosse Telephone Corporation is so engaged in interstate commerce" (R. 101-102) (Appendix A).

On May 5, 1947, judgment was entered by the La Crosse Telephone Corporation reversing and setting aside the certification decision and order made and entered by the Wisconsin Employment Relations Board.

The Wisconsin Employment Relations Board, pursuant to statutory authority, appealed to the Supreme Court of Wisconsin from the judgment of the Circuit Court of La Crosse County, Wisconsin. In this appeal the Wisconsin Employment Relations Board was represented by the Attorney General of the State of Wisconsin. The issue presented by the Attorney General in behalf of the appellant, both in its brief and argument, was that the National Labor Relations Act does not preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the La Crosse Telephone Corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees and irrespective of whether the action of the state board contravenes any substantive provisions of the National Act or any fixed policy of the National Board. The La Crosse Tele-

phone Corporation contended, both in its brief and in its oral argument before the Supreme Court of Wisconsin, that the decision of Judge Cowie should be sustained on the ground that the Wisconsin Employment Relations Board had no jurisdiction to conduct an election to determine bargaining representatives for the employes of the La Crosse Telephone Corporation, since the La Crosse Telephone Corporation was engaged in interstate commerce and in a business which directly affected interstate commerce. The La Crosse Telephone Corporation further contended on this appeal that the decision of Judge Cowie finding that there was no jurisdiction in the Board to determine the question of representation should also have included a finding that the Wisconsin Employment Relations Board was without its jurisdiction in determining that no contract existed betwen the La Crosse Telephone Corporation and its employees.

On December 23, 1947, the Supreme Court of Wisconsin reversed the judgment of the Circuit Court of La Crosse County and remanded the causes with direction to enter judgment sustaining the State Board's direction of the election and its certification of the results thereof. In its decision the Wisconsin Supreme Court adopted the issue of the appeal as stated by the Wisconsin Employment Relations Board in its brief:

> "Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the local (La Crosse) telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State board contravenes any substantive provisions of the national act or any fixed policy of the national board?"

and held that the Wisconsin Employment Relations Board had jurisdiction and that the decision of the Supreme Court of the United States in the *Bethlehem Steel Company* case v. *New York State Labor Relations Board* case did not require a ruling that the Wisconsin Employment Relations Board was without jurisdiction in the instant case. Appendix B.

VI

Cases Sustaining Jurisdiction

Allen Bradley Local #1111, United Electric Radio and Machine Workers of America v. *Wisconsin Employment Relations Board, et al.*, 315 U. S. 740;

Bethlehem Steel Company et al. v. *New York State Labor Relations Board*, 330 U. S. 767;

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197;

Morgan v. *Commonwealth of Va.*, 328 U. S. 373;

Western Union Telegraph Co. v. *Lenroot*, 323 U. S. 490.

VII

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

This case presents the question of jurisdiction of the Wisconsin Employment Relations Board over two issues between the La Crosse Telephone Corporation and its employees: (1) The selection of bargaining representatives for labor; and (2) the determining of contract rights.

It is contended that these questions are substantial and are of such a character as to affect employer-employee relationships in industry affecting commerce.

The La Crosse Telephone Corporation is an industry engaged in interstate commerce and affecting commerce as

defined by the National Labor Relations Act. It squarely comes within the language of the following case:

> "Having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hinderance."
>
> *Houston, EWT R. Co.* v. *U. S.*, 234 U. S. 342, 58 L. Ed. 1341.

Judge Cowie in his memorandum decision found that it was admitted that the La Crosse Telephone Corporation was so engaged in interstate commerce and the Supreme Court of the State of Wisconsin in its decision found that it was "rendering in connection therewith such interstate and intrastate long distance service as was incidental thereto."

The decision of the Wisconsin Supreme Court can not be reconciled with the decision of the United States Supreme Court in the *Bethlehem Steel* case.

First the Wisconsin Supreme Court relies upon and cites previous decisions of its own, such as the decision in the *International Union* v. *WERB*, 250 Wis. 550, 27 N. W. (2nd) 875, where the facts in issue were entirely different from the facts in the case at bar in that they involved the issues of unfair labor practices by employees which were not covered by the National Labor Relations Act, over which the National Labor Relations Board had never taken jurisdiction, and which therefore were proper fields of State regulation and State jurisdiction.

The National Labor Relations Act prior to its amendment under the Taft-Hartley Law did not cover the field of employee regulations. The Wisconsin statutes did cover this field and have defined what constitutes unfair labor

practices on the part of employees. Under its police power the State therefore had the right to take jurisdiction since there had been no Congressional action and no regulations by the National Labor Relations Board pertaining to the subject matter of unfair labor practices by employees. The United States Supreme Court so held in the case of *Allen Bradley Local* v. *WERB*, 315 U. S. 740. The case at bar however, presents an entirely different factual situation. Both the Wisconsin Employment Peace Act and the National Labor Relations Act provide for the selection of appropriate units for bargaining purposes. The administrative boards created by such acts have enacted regulations for the conduct of elections. Here we have State regulations and Federal regulations covering the same subject matter. Therefore under the ruling of the United States Supreme Court in the *Bethlehem Steel* case the jurisdiction of the National Labor Relations Board is exclusive and there is no jurisdiction in the Wisconsin Employment Relations Board.

The following quotations from the decision of the Wisconsin Supreme Court in the case at bar when compared with the quotations from the decision of the United States Supreme Court in the *Bethlehem Steel* case demonstrate the irreconcilable conflict of the two decisions.

Wisconsin Supreme Court:	United States Supreme Court:
1. "That although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here, until the Federal power is exercised or jurisdiction thereto is taken as to particular employees."	1. The **Companies** contend that the National Board's jurisdiction over their labor relations is exclusive of said power; the **state** contends on the contrary that while Federal power over the subject is paramount, it is not exclu-

Wisconsin Supreme Court:	United States Supreme Court:
	sive and in such a case as we have here until the Federal power is actually exercised as to the particular employees, state power may be exercised." **"The State argues for a rule that would enable it to act until the Federal Board had acted in the same case."**
2. "The State Board's action, which is under consideration on these appeals, does not involve the exercise of its discretion, nor the formulation of any policy which does or could vary from the National Labor Relations Act."	2. "Comparison of the State and Federal Statutes will show that both governments have laid hold of the same relationship for regulation, and involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have

Wisconsin Supreme Court:	United States Supreme Court:
	in the past. Cf. Re Creamery Package Mfg. Co. 34 NLRB (f) 108; Wis. Emp. Rel. Bd. case III No. 348 E-117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . .' * * * If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the Federal board had acted in the same case. But we do not think that a case by case test of Federal supremacy is permissible here."

A comparison of the Wisconsin Employment Peace Act and the National Labor Relations Act demonstrates that they differ in substantial respects.

A noteworthy conflict is the mandatory requirement permitting employees in craft units to determine whether they wish to constitute a separate bargaining unit. There is no similar provision in the National Labor Relations Act. The Supreme Court of the United States in the *Bethlehem Steel Company* case, because of a similar situation ruled against State jurisdiction in that case. The following language of the *Bethlehem Steel Company* case is in point:

> "Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus if both laws are upheld two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination or they might come out with conflicting ones as they have in the past."

Another grievous error of the Wisconsin Supreme Court is that the Court erroneously states in its decision that the State Board's action in the instant case is ministerial and does not involve the exercise of discretion. Before determining that the Board would take jurisdiction of the representation issue, it was necessary for the board to determine the status of a contract which the La Crosse Telephone Corporation had entered into with the International Brotherhood of Electrical Workers, Local B-953. Appellant contends that this was not a ministerial function but a judicial function and it necessarily involved both issues of law and fact.

Likewise, the Supreme Court of Wisconsin erred in its decision in holding that the State Board's action in the instant case does not involve the formulation of any policy. It is contended that this is error, since the question of what effect a contract between an employer and employee should

have in determining whether or not jurisdiction should be taken for the purpose of conducting an election to determine a bargaining representative for the employees, is solely a matter of policy. The National Labor Relations Board has at times held that a contract is a bar to an election and at other times held that a contract is not a bar to an election. The policy of the Wisconsin Board has likewise varied from time to time. It is contended that the case at bar demonstrates the difficulty pointed out by the Supreme Court of the United States in the *Bethlehem Steel Company* case in ruling against a case by case test of Federal supremacy over jurisdiction by a State Board.

It is further asserted that appellant's contentions have been sustained by a lower court in the recent decision in the case of *Pittsburgh Railway Company*, 54 Atl. (2) 891.

It is further contended that the legislative intent of the United States Congress as to the exclusive jurisdiction of the National Labor Relations Board is indicated by the Congressional amendments to the National Labor Relations Act commonly known as the Taft-Hartley law. By such amendments Congress has provided that the National Labor Relations Board is empowered to cede to a State agency jurisdiction over communications and other industry which are predominantly local in character, even though such cases involve labor disputes affecting commerce, unless the provisions of the State Act are inconsistent with the National Act or have received a construction inconsistent therewith.

VIII

Conclusion

The appellant, La Crosse Telephone Corporation contends that the decision of the Wisconsin Supreme Court entered on December 23, 1946, should be reversed and set

aside and that the decision of the Circuit Court for La-Crosse County should be reinstated setting aside the certification of an order issued by the Wisconsin Employment Relations Board on January 14, 1947, for the reason that the State Board exceeded its jurisdiction over the subject matter of the proceeding, contrary to the provisions of Section 8, Article I and Paragraph Two of Article VI of the Constitution of the United States.

IX

Attached hereto are copies of the memorandum decision of Judge Cowie, marked Appendix A, and a copy of the decision of the Supreme Court of the State of Wisconsin, marked Appendix B.

Respectfully submitted,

T. H. Skemp,
Q. H. Hale,
Attorneys for Appellant,
La Crosse Telephone Corporation.

APPENDIX "A"

Memorandum Decision of Judge Cowie

After a thorough consideration of the arguments presented upon the appeals in the above entitled matter from the Wisconsin Employment Relations Board, and a study of the extensive briefs submitted, I have come to the conclusion that the very recent decision by the Supreme Court of the United States in Bethlehem Steel Company et al. *v.* New York State Labor Relations Board, and The Allegheny Ludlum Steel Corp. *v.* Wm. J. Kelly et al., is so conclusive of the legal problems here involved as to relieve this court of the necessity of determining the questions raised on these appeals. In other words, it is my opinion that this decision of the United States Supreme Court leaves no constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to conduct collective bargaining elections among employees or employers engaged in interstate commerce, and of course it is admitted that the La Crosse Telephone Corporation is so engaged in interstate commerce.

It is not necessary that I set forth at any length any extracts from the opinion of the United States Supreme Court above referred to because all of the parties are familiar with the substance of that decision and its scope. I am, therefore, concluding this memorandum decision merely with the statement that in my opinion the action taken by the Wisconsin Employment Relations Board is without jurisdiction and void in the instant case.

The attorneys for the appellants will prepare such formal order or judgment as is necessary to carry out the indicated conclusion of the court.

Dated at La Crosse, Wisconsin, this 28th day of April, 1947.

By the Court.

R. S. Cowie,
Judge.

APPENDIX "B"

IN SUPREME COURT OF THE STATE OF WISCONSIN, AUGUST TERM 1947

Nos. 60 and 61

No. 60

LA CROSSE TELEPHONE CORPORATION, *Respondent*,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD et al., *Appellants*

No. 61

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local B-953, A. F. of L., *Respondent*

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD et al., *Appellants*

Appeals from judgments of the Circuit Court for LaCrosse County. R. S. Cowie, Circuit Judge. *Reversed.*

Separate actions were brought in the Circuit Court by petitions of the La Crosse Telephone Corporation and the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. respectively for the review, under Sec. 111.07 (8) Stats. of a certification made by the Wisconsin Employment Relations Board of the election of the Telephone Guild of Wisconsin as the bargaining representative for certain employees of the Telephone Corporation. The Circuit Court reversed and set aside the certification, and from judgments entered accordingly the Wisconsin Employment Relations Board appealed.

FAIRCHILD, J.: The certification made by the Wisconsin Employment Relations Board (hereinafter called State Board)

of the election of the Telephone Guild of Wisconsin (herein called Guild) as the bargaining representative for certain employees of the La Crosse Telephone Corporation (herein called Employer) was reversed and set aside by the circuit court on the grounds that the Employer is engaged in interstate commerce, and that the decision in *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 330 U. S. 767, 67 Sup. Ct. 1026, 96 L. Ed. 1054, leaves no constitutional authority in the State Board to determine collective bargaining units and conduct collective bargaining elections among employees or employers engaged in such commerce.

The principal issue on this appeal is, as stated in the State Board's Brief,

"Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the local (La Crosse) telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the state board contravenes any substantive provisions of the national act or any fixed policy of the national board?"

The employer is a Wisconsin corporation and all its employees are employed in La Crosse county in this state in its operation of a local telephone service within the La Crosse area, and rendering in connection therewith such intrastate and interstate long distance service as is incidental thereto. In and for some time prior to December, 1945, the employees in its *traffic* and its *plant* departments (which included all excepting its office workers) were represented for collective bargaining purposes by the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. (herein called Local B-953). On December 19, 1945, Local B-953 and the Employer entered into a collective bargaining agreement which was to continue in effect until December 1, 1946, and from year to year thereafter unless either party should give written notice ninety days

prior to the annual expiration date requesting that the agreement be amended or cancelled, and if an amendment was desired the contents thereof should be submitted by such party to the other on or before thirty days prior to the termination date of any year in which the ninety day notice was given, but that changes mutually agreeable may be made at any time; and in said agreement a method of negotiation for the settlement of differences was also provided under which the Employer and Local B-953 agreed to meet and deal with each other through their duly accredited officers and committees. Local B-953 in a letter dated August 28, 1946, and addressed to E. B. Samp, Employer's vice president and manager, stated that, "To meet the notice requirements of our agreement, we wish to notify you we desire to amend the agreement." Pursuant thereto negotiations concerning a new wage schedule were commenced between Samp and a committee of the traffic department employees on August 31, 1946 and were likewise commenced between Samp and a plant department committee on September 3, 1946. Wage schedules for each department were agreed upon in those negotiations and were incorporated in a letter signed by Samp and by members of Local B-953 committees and addressed to Raymond A. Panzer at Eau Claire, who was business manager of Local B-953. In the letter in relation to the plant department employees it was stated—

"These negotiations resulted in the following proposed additions, changes and dejetions to our present agreement and were acceptable to both parties alike as evidenced by the signatures of acceptance hereon * * * It was clearly understood by the undersigned that the other provisions of the present agreement as it affects traffic personnel remain unchanged."

However, in addition, representatives of Local B-953 and the Employer's officials on September 19 or 20, 1946 began negotiations for a provision which also was to be incorporated in each of the proposed contracts respecting the date when it might be opened for new wage negotiations; and at a meeting of Local B-953 on September 23, the proposed wage schedule amendments negotiated by its com-

mittees were rejected by it on the recommendation of its business manager because of the lack of a satisfactory reopening clause as to when the wage agreements could be modified under such a clause. Subsequently said business manager and Employer's officials tentatively agreed upon a date when the contract might be so reopened but, instead of accepting that date the members of Local B-953, on September 25, 1946, finally voted in favor of another date, March 1, as the reopening date. The employer was informed of Local B-953's ratification of this amendment by a letter mailed from Eau Claire on September 27, and provisions respecting said reopening date were subsequently added to the above stated letters containing the proposed wage schedules, and thereafter a new contract was drafted for the year beginning December 1, 1946. But it had not been signed by the Employer's officials and the officials of Local B-953 when, on October 18, 1946, the State Board conducted a hearing in proceedings which resulted ultimately in the election and certification of the Guild as the bargaining representative of the plant and traffic departments' employees of the Employer.

Meanwhile, during the period of the above stated negotiations the Guild, on September 20, 1946, filed with the National Labor Relations Board (herein called the National Board) a petition to have the Guild certified as the bargaining representative of the Employer's employees, who were theretofore represented by Local B-953; and the Employer was notified by a letter from the National Board's office in Minneapolis, dated September 24, 1946, of the filing of the Guild's petition. But there is nothing in the record herein to indicate that the National Board ever took jurisdiction of or pursuant to said petition; and on October 8, 1946, the Guild filed with the National Board a request to approve the withdrawal thereof. Then on that date the Guild filed with the State Board a petition for the holding of an election by all of the Employer's employees to determine what if any representation they desired for the purpose of collective bargaining. Pursuant to this petition the State Board conducted a hearing on October 18, 1946, and on November 27, 1946, filed its decision determining—

in connection with finding the facts stated above as to the negotiations in 1946 between the Employer and Local B-953, and its rejection of the proposed amendments to the collective bargaining contract because there was no provision therein specifying the reopening date for reviewing the wage question, and there was no determination by Local B-953 as to such date until at the meeting of its members on September 25, as to which the Employer was notified on September 26 or 27,—that until the Employer was given such notice,—"no binding agreement has been entered into between the Employer and union"; and that "There was, therefore, no binding agreement when the company was notified that another union claimed to represent a majority of the employees that the I. B. E. W. proposed to represent, and a contract entered into subsequent to the receipt of such notice cannot operate as a bar to an election."

Upon the matters thus determined, the State Board directed the conduct of the election in question. In its direction the Board gave the employees in each department (i.e., the plant, traffic and likewise the office departments) the opportunity to determine whether or not they desired to constitute themselves separate units; and directed that for the voting by the plant and traffic departments employees both the Guild and Local B-953 shall appear on the ballot, while for the office employees,—because of the fact that Local B-953 does not desire to represent them,—the only question submitted would be whether they desired to be represented by the Guild or not. At the election conducted by the State Board on November 27, 1946, the majority of the plant and traffic departments workers voted to constitute a single bargaining unit, which is the same group of employees which Local B-953 was bargaining for in the past and desired to continue to represent. By those employees, 91 votes were cast for the Guild, and 14 in favor of Local B-953, as their representative. The office employees voted not to be included in the same bargaining unit as the other departments and not to be represented by any union. Pursuant to that election, the State Board on January 14, 1947, certified that the Guild was elected by the employees of the Employer (excepting its executive, super-

visory and office employees) as their bargaining representative; and this certification Local B-953 and likewise the Employer petitioned to have reversed and set aside by the Circuit Court.

There is nothing in the record of the proceedings before the State Board or in the Circuit Court to indicate that the National Board has ever in any manner exercised any of its powers or discretion or otherwise taken jurisdiction of any question or phase of the Employer's or its employees' industrial relations. Although a petition that the Guild be certified as the bargaining representative of the Employer's employees had been filed by the Guild with the National Board on September 20, 1946, that Board apparently never took jurisdiction pursuant thereto, and the petition was withdrawn at the request of the Guild before it filed, on October 8, 1946, its petition with the State Board for the latter's direction to conduct and hold such an election. (See footnote below on this sheet.)

In *International B. of E. W.* v. *Wisconsin E. R. Board*, 245 Wis. 532, 15 N. W. (2) 823, we pointed out, in line with the federal courts' rulings, that the National Board is not required to accept jurisdiction or exercise its powers on every petition or complaint filed with it. As we stated in that case,—

(p. 539) "When the National Labor Relations Board has acted in a particular case, the question of whether there is a conflict between the two jurisdictions is to be determined of course by the provisions of these acts. * * * If no proceeding is had under the National Labor Relations Act, no conflict of jurisdiction can arise. This matter was fully discussed in the Rueping L. Co. Case already referred to. *The National Labor Relations Board having never taken jurisdiction to certify the name of a bargaining agent, the state board could entertain proceedings relating to violations of state law. In so doing there was under such circumstances no conflict of jurisdiction.* Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce."

In *Public S. E. Union* vs. *Wisconsin E. R. Board*, 246 Wis. 190, 194, 16 N. W. (2) 823, we said,—

"The appellants contend—(1) That the board had no jurisdiction to issue an order restraining the president of the union from acting or attempting to act as a representative in any capacity for the employees of the company; suspending the right of the union to act as a collective bargaining representative or as a representative in any capacity for the employees of the company and suspending the right of the officers of the union to serve as a representative in any capacity of the employees of the company. • • • We have considered the matter of conflict between Wisconsin and federal law in a number of other cases and have held that where the National Labor Relations Board has not taken jurisdiction in the controversy, no conflict exists."

See also *Allen-Bradley Local 1111* v. *Wisconsin E. R. Board*, 315 U. S. 740, 86 L. Ed. 1154 (237 Wis. 464, 295 N. W. 791).

And there is nothing stated in our decision in *International Union* v. *Wisconsin E. R. Board*, 250 Wis. 550, 27 N. W. (2) 875 which should be deemed to warrant concluding that the State Board's action in ordering the conduct and certifying the result of the election in question herein was not acting within its jurisdiction and powers. As we stated then, in duly applying and giving effect to the decision in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, supra,—(p. 567)

"What the court held was that the National Labor Relations Board had exercised the jurisdiction delegated to it

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Apparently (as is stated in an affidavit filed by counsel for Local B-953 on its motion to dismiss these appeals on the ground that the question involved therein has become moot) the Guild in May 1947 filed another petition with the National Board requesting said Board to hold an election to determine a bargaining representative for the Employer's employees, and that petition was dismissed on the recommendation of the Board's regional director.

under the federal act by declining to designate the foremen as a bargaining unit. The declination was an exercise of its jurisdiction, just as much as granting it would have been. The jurisdiction vested in the National Labor Relations Board was to determine whether it would designate the foreman as a bargaining unit, and it exercised jurisdiction when it denied the application. No such situation exists in the instant case as was involved in the Bethlehem Steel Co. Case, supra. In the first place, no application has been made to the National Labor Relations Board to exercise any jurisdiction of the labor dispute here involved. *The National Labor Relations Board not having exercised any jurisdiction* of such labor dispute *the state board may exercise jurisdiction* of it. *No conflict is here involved.* There was a direct conflict in the Bethlehem Steel Co. Case. The National Labor Relations Board had determined that foremen could not form a unit for collective bargaining and the state board said that they could and formed such a unit. The National Labor Relations Board's decision barred the state board from taking any action at all."

The State Board's action, which is under consideration on these appeals, does not involve the exercise of its discretion nor the formulation of any policy which does or could vary from those of the National Labor Relations Act. The mere fact-finding procedure of the State Board in the ascertainment of the facts, and its thereupon ordering and conducting an election and certifying the result thereof, constitutes action in merely its ministerial capacity (*United R. & W. D. S. E. of A.* v. *Wisconsin E. R. Board*, 245 Wis. 636, 641, 15 N. W. (2) 844; *J. F. Quest Foundry Co.* v. *International M. & F. W. Union*, 216 Minn. 436, 441, 13 N. W. (2) 32; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 Fed. (2) 876, 882); and does not deny to the National Board or interfere with its right to exercise its discretion and powers if it should ever conclude to exercise its jurisdiction and powers in that respect to determine the appropriate bargaining representative or unit of representation. But, although the National Board's power over that subject is paramount, it is not exclusive in such a case as

we have here, until the federal power is exercised or jurisdiction thereto is taken as to particular employees.

There cannot be sustained the contention of the Employer and Local B-953 that the State Board erred in determining that no new binding contract had been finally entered into between them in 1946 prior to the Employer's receiving notice that another union claimed to represent a majority of the employees whom Local B-953 had been representing. Although in the course of the negotiations between Samp and committees of employees in the traffic and also the plant departments they had come to agree, by September 19 or 20, as to the wage schedules and working hours, no new contract had been completely written or signed by the Employer and by Local B-953, as the bargaining agent, because, as stated above, they had not been able, in their negotiations, to agree upon the date at which the proposed contract might be reopened for new wage negotiations. After the amended wage schedule and working hours, which had been negotiated by Samp and the employee committees, were rejected by the employees' action at their Local B-953's meeting on September 23 because of the lack of a mutually satisfactory reopening provision, the Employer was not informed until by a letter mailed from Eau Claire on September 27, that the union membership finally voted to set March 1 as the date on which negotiations as to wages might be reopened. But a new contract for the year beginning December 1, 1946, was not drafted until some time after September 27, 1946, and apparently no such contract had been executed by the officials of Local B-953 or the Employer when, on October 8, 1946, the Guild filed its petition with the State Board for an election of the employees to determine what collective bargaining representation they desired, or even when the Board filed its direction for the holding of such election.

Neither can there be sustained the Employer's and Local B-953's contention that the results of the balloting at the election did not provide sufficient basis for the State Board's certification that the Guild had been selected as the majority representative of the employees in the traffic and the plant departments, and that the Guild's petition be dismissed in so far as it related to the office employees. As claimed by

the State Board, the results of the votes cast appear to be to the following effect. Of the 114 employees in the traffic department who were eligible to vote, 52 voted against having the employees of that department bargaining collectively as a separate unit, and 13 in favor thereof; and 64 voted for the Guild and 1 for Local B-953 as their bargaining representative. Of 40 employees in the plant department eligible to vote, 25 voted against a separate bargaining unit, and 12 in favor thereof; and 27 voted for the Guild and 13 for Local B-953 as their representative. Consequently of the 105 employees who voted that they desired to bargain together, 91 desired to be represented by the Guild, and 14 by Local B-953. Of 31 office employees eligible to vote, 10 voted in favor of a separate unit, and 18 voted against it or having any collective bargaining representation. The vote as to whether the employees of the traffic department desired to bargain as a separate unit, and as to whether the employees of the plant department desired to bargain as a separate unit was decidedly against each of these departments bargaining as a separate unit. The alternative thereto was not necessarily a unit which would include office employees. No question submitted to the employees on their ballots was contingent upon the result of any other, either in wording or in spirit. The votes of the employees in the traffic and plant departments as to who should constitute their representative for collective bargaining purposes were unconditional; and of the 105 employees in those departments who voted that they desired to bargain as a unit, 91 voted unconditionally to be represented by the Guild. The State Board had published advance notices of the election with sample ballots, but neither Local B-953 nor any other party made any request of the Board prior to the election that it be conducted in a different manner. If there were any objection to the manner in which the Board proposed to hold the election, the objection should have been submitted to the Board, and as none was so submitted, it cannot be raised for the first time upon review in court. As is provided in sec. 111.07 (7), Stats.,— "no objection that has not been urged before the board shall be considered by the court unless the failure or

neglect to urge such objection shall be excused because of extraordinary circumstances."

It follows that the judgments under review must be reversed and the causes remanded with directions to enter judgments sustaining the State Board's direction of the election and its certification of the results thereof.

By the Court:—Judgments reversed in each case, and causes remanded with directions to enter judgments in accordance with this opinion.

(5591)